No. 588

In the Supreme Court of the United States

OCTOBER TERM, 1939

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BRADFORD DYEING ASSOCIATION (U. S. A.)

REPLY OF RESPONDENT, BRADFORD DYEING ASSOCIATION, TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

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Bradford Dyeing Association, respondent named in the foregoing petition of the Solicitor General, prays that said petition for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the First Circuit entered on August 2, 1939, be denied.

OPINIONS BELOW

The opinions below are correctly stated in the petition (Page 1).

JURISDICTION

The jurisdiction of this Court is correctly stated in the petition (Page 2), except that such jurisdiction would appear to arise only under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 10 (e) of the National Labor Relations Act. Section 10 (f) of the latter Act, which is cited in the petition, appears to apply to applications for review by persons other than the National Labor Relations Board. There was no application for review, in the present proceeding, by any person except the National

Labor Relations Board. The Board may have also proceeded under Section 9 of the Act in conjunction with its proceeding under Section 10.

QUESTION RAISED

The three "Questions Presented" in the petition (page 2) tend to confuse the issue since they merely combine and restate in different form the seven "Specification of Errors" appearing in the petition (page 10) and it is submitted that a consideration of such questions would be better based upon the "Specification of Errors". In any event, these issues are merely subordinate to the primary question raised by this petition which is as follows:

In view of the lack of conflict with the decisions of other courts, the lack of conflict with the decisions of this Court, the lack of general importance of the issues involved, and the fact that no substantial injustice can be done by remanding the case for an election, should the unanimous judgment of the court below upon the facts appearing in the record be reviewed by this Court?

STATUTE INVOLVED

The provisions of the National Labor Relations Act that respondent deems pertinent are set forth in the Appendix hereto.

STATEMENT OF THE CASE

Petitioner's statement of the case omits many important matters which are determinative of the questions raised. The petition recites findings of the Board, not the evidence. Since the Board's action depends on the sufficiency of evidence to warrant its findings, we must examine the evidence and not rely on the Board's findings.

1) *Nelson and Schofield*—Although the petition states it is not relying on the questions involving Nelson and Schofield as a reason for granting the writ, nevertheless the petition

oes on page 6 recite certain claimed facts in connection ith them.

The Circuit Court found that there was not substantial vidence to warrant the findings of the Board that Re-pondent discharged Nelson and Schofield because of their nion activities and that the order of reinstatement with full ay from the time they were laid off was not warranted either y the facts or to effectuate the policies of the Act. *N. L. R. B. . Fansteel Metallurgical Corporation*, 306 U. S. 240; *Con-olidated Edison Co.* v. *N. L. R. B.*, 305 U. S. 197.

The court found and the evidence clearly shows that Nelson nd Schofield were not discharged or laid off for C. I. O. ac-ivity, but in the case of Schofield for deliberately violating he rules of the plant against smoking in the plant (R-82, . 91-2; R-465, A. 359; R-383, Q. 295; R-129, Q. 529-531), and Nelson for insubordination, defiance, loitering, leaving his ork without permission, interrupting conferences in the lant between Respondent's President and others, bursting n on private meetings in the office of Respondent's President nd being in the plant at night when he had no business being here (R-137, Q. 50-52; R-140, Q. 9; R-398, Q. 21 & 23; R-407, . 121 & 126; R-409, Q. 148-150; R-446-451). The evidence is ndisputed that both Schofield and Nelson after their dis-harge and layoff, from outside the plant, committed unlaw-ul acts in conjunction with one Rhodes inside the plant by ttempting to induce the workers in the plant to participate n a sit-down strike (R-353, 359, 418-9); that Nelson threat-ned truck drivers delivering materials to the plant with vio-ence (R-350-4, 417; R-153, A. 196) and also threatened to estroy spur tracks over which materials were delivered to he plant (R-351). *N. L. R. B.* v. *Fansteel Metallurgical orporation, supra.* The Court also found that neither of the nen attempted to seek re-employment (R-688). The Act. oes not interfere with the normal right of the employer to elect its employees and to discharge them. *N. L. R. B.* v. *Jones & Laughlin Steel Corp.* 301 U. S. 22, 45, 46.

2) *Domination of Administration*—With reference to the claim of domination by the employer of the administration of the Employees' Federation, the Board points only to two items in support of its finding: (a) the claim that Respondent furnished space, rent free, for the meetings of the Federation Executive Committee (Petition, p. 8 and R-657); and (b) the matter of Potter (one of the Federation officers) using Respondent's automobile on one occasion (R-657). The facts with reference to these two items were brought out in testimony on cross-examination of the Board's witness (R-238-9).

As to the Board's finding that space for the Executive Committee of the Federation was furnished, rent free, in premises owned by Respondent, this misleading statement ignores the uncontradicted evidence (R-239) that the premises were not in the possession or control of the respondent but were rented by it to the Bradford Social Club in whose rooms these meetings were held; that these premises were located outside of and away from the plant of Bradford Dyeing Association on Main Street in the center of the Village of Bradford, and that this tenant, the Bradford Social Club, was accustomed to permit the use of its club rooms for such things as meetings of various organizations, including such organizations as the Garden Club.

As to the use of a company car by Potter on one occasion, it appeared in testimony that employees were frequently permitted to use company cars, particularly if something came up that necessitated an employee using it (R-238-9). It was shown that the public transportation system between Bradford and Westerly was by bus which ran only two or three times in the morning and two or three times in the afternoon and once late at night, and if a man had a real need for use of a company car, it would be gladly lent him (R-238-9).

After the meeting in the shipping room (R-219-220) on April 7th, all meetings of the Employees' Federation and of its executive committee were held away from the plant and mostly at various public halls in Westerly (R-233).

Respondent contends that there is not a scintilla of evidence in the Record establishing any domination by Respondent of the administration of the Federation.

3) *Domination of Organization of Federation*—The petition devotes pages 5-8 to summarizing the Board's findings of fact as to unfair labor practices. No attempt is made to support such findings by references to the evidence. These findings were considered by the Circuit Court and, in important instances, found not to be supported by substantial evidence.

The Record discloses that certain employees on April 6 availed themselves of their right, under Section 7 of the Act, to self-organization; inaugurated the formation of a labor organization with the result that by April 9 a majority of the appropriate employees had signed cards joining the Federation; and requested that it be recognized as the sole bargaining agent with respect to wages, hours of labor, and general working conditions. On the same date these membership cards were presented to the management and checked with its payroll. This check showed 484 employees (R-428) out of a total of approximately 750 to be members of the Federation. On that date, April 9, respondent recognized the Federation as the exclusive bargaining representative of the employees.

As to claims set forth in the Board's petition (pages 6 and 7) evidence shows Summersby returned from New York April 2 (R-446, Q. 317) and, while talking about jiggers' working conditions with Bradley, Schofield and Nelson in the Dye House, was told of C. I. O. organizing activity. (R-78, Q. 423) (R-133, Q. 23) (R-447, Q. 318).

The record shows no C. I. O. organizer or representative ever met the management or advised the management of number enrolled or requested bargaining privileges for the C. I. O. until April 13th (R-452-4) (after force method by attempted C. I. O. sit-down strike (R-420, Q. 21-3) (R-417) (R-421-2, Q. 6-15) (R-424, Q. 10) (R-418-419, Q. 8-10)

(R-356, Q. 41) had failed) and not even then on request was any proof submitted of the number claimed to be enrolled. (R-455).

The B. D. A. Employees' Federation (organized by a former A. F. of L. organizer) (R-432-3, Q. 25-7; R-430, Q. 15) gave the management proof of majority enrollment (R-258-259) and obtained bargaining rights April 9th (R-228, Q. 151) previous to any request for meeting with any C. I. O. representative. (R-452, Q. 324.)

The record shows Mr. Summersby's attendance at employee committee meetings was for the purpose of discussing grievances and working conditions as testified by Board witnesses on April 2nd (R-92) (R-364, Q. 38-39), on April 6th (R-185, Q. 18) (R-171, Q. 15) (R-218-219) and he expressed reluctance to attending the meeting for discussion of grievances April 7th, but acceded in accordance with the requirements of the Act. (R-468, Q. 374-379).

There is no evidence bosses selected men to attend any meetings. (R-180, Q. 141) (R-472, Q. 397). As testified by Board witness it is apparent cards were passed out (with no objection on the part of the management) and membership solicited during working hours by both the Federation and C. I. O. with intimidation to procure membership on the part of the C. I. O. (R-250, Q. 418-420) (R-132, Q. 8) (R-77, Q. 30-33; R-133, Q. 50-53). The management did not give permission to employees to pass out cards or literature (R-469, Q. 382-4), (R-356, Q. 39), and no supervisory employees participated (R-277, Q. 165-6) (R-356, Q. 38).

As Summersby testified, he was aware of the provisions of the Act that a "group of employees shall have the right at any time to present grievances to their employers" and that "an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay". (R-468, Q. 378-9).

Summersby's attitude, caught as he was between the grindstone of the organizing propaganda of two rival Unions, is

well expressed in words of five Board witnesses who testified as follows:

Nelson: "He told me he wasn't going to hinder us from further organization of the plant. (R-136, Q. 48).

(His foreman thought Summersby had given him the privilege to do this. (R-409, Q. 150) (R-398, Q. 20-21)).

Azzinaro: "He did say he would recognize 51 percent of the laborers, if he was given proof that 51 percent had signed up * * * with either one of the unions, either the local or the other". (R-186, Q. 21-22)

Defanti: who testified in connection with Federation organizing activity he attempted to give people an impression Summersby would not deal with the C. I. O. (R-431, Q. 16), testified "He said he wouldn't recognize *any union* unless they were organized *51 percent*." (R-430, Q. 10-11).

Ashworth: "He did state that in accordance with the Wagner Labor Act anyone that could prove to him that they had 51 percent of the employees signed up, he would have to recognize them as a body. . . ." (R-284, Q. 237).

Potter: Questioned as to whether Summersby pointed out (at the meeting on April 6) the advantages of a local union as against the disadvantages of an outside union like the C. I. O., answered "I don't recall him passing any remark in that respect". (R-219, Q. 54).

Pawson: "I have never heard Mr. Summersby say he would never deal with the C. I. O." (R-357, Q. 44-45).

Summersby: (to Nelson) "you are doing some work for the C. I. O. That is all right by me. I don't want you to feel that I have any objection to your organizing in this plant for the C. I. O. But you must act as a gentleman." "Now," I said, "you follow the example of Percy Schofield; he is keeping his feet on the ground and acting as a gentleman." (R-449, A. 320).

Summersby testified he did not at any time say he would not recognize, deal with or contract with the C. I. O. (R-467, Q. 370).

On April 23 the Federation affiliated itself with the Associated Workers of Printing, Finishing and Allied Industries and became Local 16 of the Associated Workers. 502 employees then signed new cards signifying that they were joining the Associated Workers, (R-230-1; Ex. 25 R-525 admitted R-237; Ex. 44 R-569 admitted R-489; R-488).

4) *T. W. O. C. Representation*—The vacating by the Court of the fourth paragraph of the Board's order directing Respondent to cease and desist from refusing to bargain collectively with the T. W. O. C. as its exclusive representative, based on its opinion that the finding by the Board of T. W. O. C. majority representation was without substantial evidence on which to rest (R-688), was fully justified by the evidence.

Two types of cards were used by the C. I. O.:—

(a) White card (Board's Ex. 15) (See Appendix) (Admitted in evidence R-77). This card reads in part as follows:

> "I hereby pledge to become a member of an Affiliated Union of the C. I. O. . . . I further agree to have the Affiliated Union act as my collective bargaining agency in all matters pertaining to rates of pay, wages, hours of employment, or other conditions of employment."

This card is a pledge to become a member, not an agreement of membership, in an Affiliated Union of the C. I. O.

Board's witness Schofield testified that a majority of those who signed either card signed the white card (R-103, Ans. 305, 310, 311).

(b) Blue card (Board's Ex. 16) (See Appendix) (Admitted in evidence R-77) read:—

> "I hereby accept membership in the TEXTILE WORKERS ORGANIZING COMMITTEE of the Committee for Industrial Organization and of my own free will hereby authorize the TEXTILE WORKERS ORGANIZING COMMITTEE, its agents

or representatives, to act for me as a collective bargaining agency in all matters pertaining to rates of pay, wages, hours of employment or other conditions of employment."

The signers of these blue cards (according to Schofield) amounted to less than a majority of all C. I. O. cards signed at Respondent's plant. The total number of signers claimed by C. I. O. was 481, so that 241 or more signed white cards while 240 or less signed blue cards out of a total of about 750 employees in the appropriate unit (R-50-52). The distinction between the two cards is clearly apparent—the white card pledging a signer "to become a member of an Affiliated Union of the C. I. O." and to have the "Affiliated Union act as my collective bargaining agency." The blue card is a definite acceptance of membership in the T. W. O. C. of the C. I. O. with authorization to such T. W. O. C., its agents, etc., to act for the signer.

The record discloses that no "affiliated union of the C. I. O." was ever organized at Bradford; Salerno, the C. I. O. organizer, testified that no Union for Bradford Dyeing Association members was ever organized (R-320).

The white card clearly contemplated that an Affiliated Union of the C. I. O. was to come into existence, which never happened; therefore the signers of the white card neither designated nor selected representatives to act for them.

The Circuit Court decided that the finding of the Board that the T. W. O. C. had a majority of the employees signed up "is without substantial evidence on which to rest."

The list of signed cards presented by the C. I. O. at the hearing in July, 1937, was claimed by it to be a list of those who had signed both white and blue cards up to April 10, 1937, but, on April 9, 1937, the Federation presented to Respondent signed cards which it checked showing 484 employee memberships (R-428).

Nelson and Schofield were neither officers of the T. W. O. C. nor authorized to represent it. They were merely "volunteers". (R-309, A. 98-99).

The first demand by any representative of the C. I. O. for bargaining rights was made by Salerno of the C. I. O. on April 13, 1937 (R-429). Four days before that Respondent had recognized the Federation and so informed Salerno, saying Respondent was not in a position to recognize or deal with C. I. O. (R-454-5).

Even at the meeting on April 13 Salerno refused to prove his right to majority representation by submitting his signed cards to Respondent. It is elementary that any agent, on request, must show his authorization. This has so been held under the Labor Act, particularly where Respondent has reason to doubt whether the person representing himself as majority agent is in fact such. See *N. L. R. B.* v. *Remington Rand, Inc.*, 94 F. 2d. 862, 868; certiorari denied 304 U. S. 576.

The Board states near the bottom of page 8 of its petition, "At all times after April 4 respondent, although requested so to do, refused to bargain collectively with the T. W. O. C." There can be no refusal to bargain until there is a demand to bargain. *N. L. R. B.* v. *Columbian Enameling & Stamping Company, Inc.*, 306 U. S. 292. There was no demand to bargain with the T. W. O. C. until April 13th (R-429). The statement in the petition is erroneous.

There is no evidence as stated near the bottom of page 8 of the petition that *respondent* knew of any T. W. O. C. claimed majority by April 2. This finding is based on a chance remark of Nelson to an employee in the main office that he had 60% signed up (R-135). There is no evidence that this employee, Gould, told this to any officer of respondent, and certainly Gould's knowledge was not knowledge by respondent.

The offer of Salerno to submit his signed cards to a third party pointedly suggesting Bernard, United States Department of Labor conciliator (R-303-4) was a far cry from a

compliance with respondent's request that he submit to *respondent* proof of the numbers who he claimed had designated the C. I. O. to represent them. Submitting cards to some third party would not be, as claimed on page 18 of petitioner's certiorari petition, a disclosure to respondent itself so that it could be satisfied by proof. It is elementary that any agent on request must show his authorization. This is true in any business dealing. It is specifically held so under the Labor Act, particularly where respondent has considerable reason to doubt whether a person presenting himself represents a majority of respondent's employees. *N. L. R. B.* v. *Remington Rand, Inc.*, 94 F. 2d. 862; certiorari denied 304 U. S. 576.

REASONS FOR DENYING THE WRIT

1) The question of jurisdiction of the National Labor Relations Board (Spec. of Error No. 1) is not involved. The opinion of the court below discussed the question of the Board's jurisdiction over the dispute, but the court did not dismiss the petition of the Board for lack of jurisdiction. On the contrary the court sustained paragraphs "1", "2" and "3" * of the order of the Board, thus necessarily recognizing

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"ORDER"

*"Upon the basis of the findings of fact and conclusions of law and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent, Bradford Dyeing Association (U. S. A.), Bradford, Rhode Island, and its officers, agents, successors, and assigns shall:

"1. Cease and desist from in any manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act.

"2. Cease and desist from in any manner dominating or interfering with the administration of B. D. A. Employees' Federation or with the formation or administration of any other labor organization of its employees and from contributing financial or other support to B. D. A. Employees' Association or any other labor organization of its employees.

"3. Cease and desist from discouraging membership in Textile Workers Organizing Committee or any other labor organization of its employees by discrimination in regard to hire or tenure of employment or any terms or conditions of employment....."

the jurisdiction of that body. Indeed the expressed doubts in the petition itself (Petition pp. 12, 16, 18) as to whether the court did refuse to recognize the jurisdiction of the Board lead the respondent to believe that the petitioner is not very seriously urging this jurisdictional ground. The first error specified does not exist.

2) There is no conflict between the decision of the court below and the decisions of other courts inferior to the Supreme Court. The petition cites no conflicts between such courts and the decision of the court below, and search by the respondent also fails to disclose any such conflicts.

National Labor Relations Board v. *Falk Corporation*, decided by this Court January 2, 1940, is referred to on page 16 of respondent's petition. No contention is made that the Circuit Court's decision in that case conflicts with the decision of the Circuit Court in the instant case and clearly it does not; nor does the decision in the Circuit Court in the instant case conflict with this Court's decision in the *Falk* case. In the *Falk* case the Circuit Court ordered the local union to be on the ballot; in the instant case the court below neither ordered the Federation to be on the ballot nor did it order an election. In the *Falk* case the Board certified no bargaining representative; in the instant case the Board found the T. W. O. C. to be the bargaining representative. The *Falk* case and the instant case are clearly distinguishable upon their particular facts and circumstances.

3) There is no conflict between the decision of the court below and the decisions of this Court.

The only decisions of this Court claimed by the petition to conflict with the decisions of the court below are *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, *National Labor Relations Board* v. *Pacific Greyhound Lines, Inc.*, 303 U. S. 272, *National Labor Relations Board* v. *Newport News Shipbuilding and Drydock Co.*, No. 20, October 1939, term decided December 4, 1939, and

National Labor Relations Board v. Fansteel Metallurgical Corp., 306 U. S. 240.

The foregoing decisions are clearly distinguishable from the present case.

In the *Pennsylvania Greyhound* case, this Court recognized that disestablishment of an existing union is not always a prerequisite to an election, even though cessation of unfair labor practices is ordered, for this Court said (303 U. S. at 270):

> "We may assume that there are situations in which the Board would not be warranted in concluding that there was any occasion for withdrawal of employer recognition of an existing union before an election by employees under § 9 (c), even though it had ordered the employer to cease unfair labor practices."

This court very properly held, however, upon the *facts*, that such disestablishment was an essential prerequisite to an election because the existing union in that case gave the employees no effective representation (303 U. S. at 270):

> "But here respondents, by unfair labor practices, have succeeded in establishing a company union so organized that it is *incapable of functioning* as a bargaining representative of employees. With no procedure for meetings of members or for instructing employee representatives, and with no power to bring grievances before the Joint Reviewing Committee *without employer consent*, the Association could not without amendment of its by-laws be used as a means of the collective bargaining contemplated by § 7; and amendment could not be had without the employer's approval." (Italics supplied.)

Likewise in the *Newport News Ship Building* case, the facts were that under the by-laws (the so-called "1937 Plan") any effective action of the union depended upon the agreement of the company and the plan could not be amended if the company disapproved the amendment.

In the instant case, however, there is no evidence whatever of any company right of control over the Federation. There

is undisputed testimony, not only that the Federation was capable of functioning as a bargaining representative of Respondent's employees, but that it actually was functioning as such representative (R-264) and had so functioned in numerous instances (R-401-4; 410-414; 425-7); that there was ample procedure for meetings of employees (R-521) and that many such meetings were held (R-222, 232-3); that the Federation had ample powers to present grievances without employer consent of any sort (Ex. 24, 5-517, admitted R-236) and that it did so (R-401-4; 410-414; 425-7); and that the Association could without by-law amendment be used as a means of the collective bargaining contemplated by Section 7 with full powers independently of the employer (R-517, 520.).

In the *Pacific Greyhound* case there was found to be substantial evidence to support a finding of domination *in fact* by the employer, not only of the *formation* but also of the *administration* of the local union. In the present case the Circuit Court does not find that there was any adequate evidence of domination in either the *formation* or the *administration* of the Employees' Federation, which it refers to as a "legitimate body to represent them" (Opinion, R-688). Indeed there is not a scintilla of evidence of domination by the employer of the actions or administration of the Federation.

In the *Fansteel* case the Board's finding of unfair labor practices was held to have substantial support in the evidence because the company employed a "labor spy" to engage in espionage within the Union, isolated the president of the company Union from the other workers, and had otherwise restrained and coerced the employees. The Board ordered the respondent to desist from such interference with its employees' exercise of thei right of self-organization and collective bargaining, and in addition ordered the employer to bargain with the Union (Lodge 66). This Court sustained the first part of the Board's order (as did the court below in the instant case) but found no substantial evidence that the

Union represented a majority of the employees and therefore reversed the Board's order to bargain with the Union until an election was held, saying (306 U. S. 261-262):

> "The Board's order properly requires respondent to desist from interfering in any manner with its employees in the exercise of their right to self-organization and to bargain collectively through representatives of their own choosing. But it is a different matter to require respondent to treat Lodge 66 in the altered circumstances as such a representative. If it is contended that Lodge 66 is the choice of the employees, the Board has abundant authority to settle the question by requiring an election."

This was precisely the decision of the court below in the instant case.

The procedure in the present case of remanding the case to the Board for an election was approved in *Ford Motor Co. v. National Labor Relations Board*, 305 U. S. 364, 374, and was followed by this Court in *Hammond v. Schappi Bus Lines, Inc.*, 275 U. S. 164, 171; 72 L. Ed. 218, 221. And in the *Newport News* case the Board itself contended that a remand to the Board for further proceedings was the proper way to present to the Court additional facts as to the result of an election.

It is, therefore, submitted there is no conflict between the decision of the Court below in the present case, and the decisions of this Court. The 3rd, 4th, 5th and 7th Errors specified do not exist.

4) The decree of the Court below was in accordance with the Act. Under the provisions of Sections 9 (d) and 10 (e) of the Act the Circuit Court had the "power to . . . make and enter . . . a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board." The Act thus provides that the Court may do one of three things: first, enforce; second, modify and enforce as modified; or third, set aside in whole or in part. The court

did the third of these three things. It set aside in part the order of the Board. Having done this it did all it was required to do under the Act and it need not also enforce part of the order of the Board.

5) The decision of the Court below is not of sufficient general importance to warrant review by this Court.

The court below refused to order the respondent to reinstate two individuals to their former positions or to make them whole for any loss of pay. This decision is of interest to the two individuals, of course, but it is of no general importance because it is stated by the Court to be rested upon the *facts* in the record with respect to the discharge for cause and subsequent misconduct of these individuals (attempted sit-down strike and threats of violence to persons and property) and failure to return to work (R-688-690). This involves no principles of law of general public interest.

The sixth error specified and the first half of the second error specified both refer to Nelson and Schofield. These are not relied upon by the petitioner for granting of certiorari. (See footnote page 3 of petition) and, therefore, should be disregarded here.

The refusal of the court below to enforce the order of the Board requiring the respondent to bargain collectively with Textile Workers' Organizing Committee and to disestablish the B. D. A. Employees' Federation is stated by the Court (R-688) to be rested, not upon the principle, as alleged in the petition (page 14), that it was necessary to hold an election among the employees before disestablishment, but upon the ground: (1) that it does not appear that any such an organization as an affiliated union of the C. I. O. even came into actual existence with authority to negotiate a contract with respondent (R-688); (2) that it does not appear by substantial evidence that a majority of the employees ever joined, or indicated an intent to join the T. W. O. C. (R-688); (3) that the finding of the Board that the T. W. O. C. had a majority of the employees of the respondent signed up even

to become members of a union under that name is without substantial evidence on which to rest (R-688); (4) that disestablishment of the B. D. A. Employees' Federation would leave the employees without any legitimate body to represent them in case of a labor dispute's arising (R-688).

It is well established that a court may remand a cause to an administrative body for further proceedings to the end that valid and essential findings may be made. "If further evidence is necessary and available to supply the basis for findings on material points, that evidence may be taken." *Ford Motor Company* v. *National Labor Relations Board*, 305 U. S. 364 at 374. The refusal of the Court below to sustain the Board's orders of recognition and disestablishment until the evidence as to employees' choice, which an election can furnish, has been secured, is nothing more than a remanding of the proceeding to secure the necessary evidence for further findings.

6) Even if some technical errors could be established in the decision of the court below, there is no indication that the decision of that court (which merely refuses to sustain all of the paragraphs of the Board's order except in the light of the added information to be obtained from an election to be held under the Rules and Regulations prescribed by the Board) imposes any substantial injustice. Indeed, such a decision would appear to be well adapted to accomplish the purposes of a statute designed to promote peaceful industrial relations between employer and employees, to insure to a majority of employees the right to be represented by a collective bargaining agency of their choice, and to accomplish the speediest and most satisfactory solution, for all concerned, in such relationships.

7) The petition appears to be designed to induce this Court, without substantial grounds, to review a decision below which is merely against the interest of a particular party, which turns upon that court's unanimous judgment as to the absence of substantial evidence, which involves no

controversy of *public* concern as to legal principles, and in which petitioner seeks to invoke action by this Court, contrary to the established function of limiting the certiorari process to those cases where it is necessary to secure harmony of decision and the settlement of questions of peculiar gravity and general importance. *In Re Woods*, 143 U. S. 202, 36 L. Ed. 125; *American Construction Co.* v. *Jacksonville, T. & K. W. R. Co.*, 148 U. S. 372, 383, 37 L. Ed. 486, 491; *Forsyth* v. *Hammond*, 166 U. S. 506, 514, 41 L. Ed. 1095, 1098. This petition does not show the self-imposed restraint with which the bar must cooperate to prevent flooding this Court with applications which are devoid of merit. As was stated by a distinguished scholar prior to his elevation to the bench of this Court (42 Harvard L. Rev. 1-29):

> "It is not for the Supreme Court . . . charged with keeping our constitutional system in equilibrium to pass upon disputation over evidence" (p. 23) propounded "upon a stream of certioraris" (p. 15) but this Court must be permitted "to conserve its energies for issues appropriate to the Supreme Bench." (p. 1)

CONCLUSION

It is respectfully submitted that the court below found that there was jurisdiction in the National Labor Relations Board; that its decision was in accordance with the Act and the applicable decisions of this Court and of inferior courts; and that the remaining question as to whether there was substantial evidence to support the findings of the Board, which the court below found there was not, is not of such peculiar gravity or general importance as to warrant this Honorable Court in occupying its time with this particular case. It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied and the decree of the Circuit Court of Appeals for the First Circuit entered

on August 2, 1939, should be permitted to stand as the final decree in this matter.

HARRY PARSONS CROSS,
GEORGE PAUL SLADE,
GREENOUGH, LYMAN & CROSS,
Counsel for Respondent, Bradford Dyeing Association (U. S. A.)

January, 1940.

APPENDIX

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, U. S. C., Supp. IV, Title 29, Sec. 151 et seq.) are as follows:

SEC. 2. When used in this Act—

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not

be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertin[1] such representatives.

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

[1] So in original.

(c) The testimony taken by such member, agent or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action (including reinstatement of employees with or without back pay) as will effectuate the policies of this Act. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon all the testimony taken the Board shall be of the opinion that no person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency,

shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(h) When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes", approved March 23, 1932 (U. S. C., Supp. VII, title 29, secs. 101-115).

Board's Exhibit 15—WHITE membership card.

C. I. O. COMMITTEE FOR INDUSTRIAL ORGANIZATION C. I. O.

(The Rhode Island Council of the C. I. O. Organizing Committee) 1929 Westminster Street, Providence, Rhode Island, West 1120.

Date.....19

I hereby pledge to become a member of an affiliated union of the C. I. O for the purpose of bettering conditions for all workers. It is understood that by signing this card I will not be obliged to pay any initiation fee or monthly dues until such time as the workers in my plant or department are organized to the extent of at least 60%. I further agree to have the affiliated union act as my collective bargaining agency in all matters pertaining to rates of pay, wages, hours of employment, or other conditions of employment.

Name .....

Address .....

Employed by .....
Company

.....
Location

Dept. .....

If not working check ☐

.....
Organizer

Board's Exhibit 16. BLUE membership card.

Form No. 9.

TEXTILE WORKERS' ORGANIZING COMMITTEE
OF THE COMMITTEE FOR INDUSTRIAL ORGANIZATION

176 Federal Street, Boston, Mass. B No. 239441

(Date) 19

I hereby accept membership in the Textile Workers' Organizing Committee of the Committee for Industrial Organization and of my own free will hereby authorize the Textile Workers' Organizing Committee, its agents or representatives to act for me as a collective bargaining agency in all matters pertaining to rates of pay, wages, hours of employment, or other conditions of employment.

Employed by.....
(Name of Company) (Mill)

Address of Company.....

Department .....

Branch of Textile Industry.....

If not working check ☐

.....
Name

.....
Organizer

.....
Address

(In perforated square)
B No. 239441

Form No. 9

Member's Receipt

Textile Worker's Organizing Committee
176 Federal St., Boston, Mass.

This is to certify that.....
Name of Member.

has accepted membership in the Textile Workers' Organizing Committee of the Committee for Industrial Organization.

Date..... 19

Organizer.....